OUTER HOUSE, COURT OF SESSION

[2019] CSOH 12

P237/18

OPINION OF LORD TYRE

In the cause

AE

Petitioner

against

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Petitioner: Winter; Drummond Miller LLP
Respondent: McIver; Office of the Advocate General

13 February 2019

Introduction

[1] The petitioner is Nigerian. She arrived in the United Kingdom in 2013 on a student visa which was extended until 22 November 2016. On 14 December 2016 she claimed asylum on the ground that she was at risk of harm by cults if she were to return to Nigeria. Her asylum claim was refused by the respondent and she appealed to the First-tier Tribunal ("FTT"). By decision dated 28 July 2017 the FTT refused her appeal. Her application to the FTT for leave to appeal to the Upper Tribunal was refused. She then applied to the Upper Tribunal for leave to appeal to it. By decision dated 8 December 2017 the Upper Tribunal refused leave.

[2] The petitioner now seeks judicial review of the decision of the Upper Tribunal refusing leave to appeal against the decision of the FTT. Permission to proceed with this petition was initially refused but was subsequently granted on review following an oral hearing. The issue for determination by the court is whether the Upper Tribunal erred in law in deciding that there were no arguable grounds of appeal against the FTT's decision.

The FTT's decision

[3] Having narrated certain uncontroversial facts regarding the petitioner's current circumstances, the FTT judge stated (paragraph 21) that he had considered the totality of the petitioner's evidence before him, including the record of two interviews, a letter from her representative regarding amendments to her substantive asylum interview, her written witness statement, and her oral evidence. On the basis of that material, the FTT accepted that the petitioner's father had, prior to his death in 2005, been a prominent lawyer and politician who had been instrumental in the formation of a political party which had produced a former president of Nigeria. The FTT further accepted that he had been a member of two cults, this being a prerequisite of a successful political career in a particular area of Nigeria.

[4] The petitioner's evidence to the FTT may be summarised as follows. Her father had pledged to the chief priest of one of the cults that the petitioner would marry him. When she was about 9 years old, her father took her to the priest who made marks on her body which have left scarring. She graduated from university in 2002. After her father's death, members of the cult came to the family home to discuss her marriage to the chief priest. However she re-located to Lagos, where she lived, mostly alone, from 2005 until she came to the UK in 2013. She worked as a flight attendant with an aviation company until 2014. In

July 2011 there was a fire in her apartment in Lagos while she was at work. A few days later she was approached by four armed individuals who said they had caused the fire. They entered her car and threatened to take her back to her home city. They stole her car.

[5] The petitioner further stated that while in the UK she was contacted by a friend of her father who persuaded her to return to Nigeria where he would assist her in appeasing cult members. On arrival in Nigeria she discovered that the friend had tricked her. She was kept in a room at his house. However she in turn tricked him and managed to depart on a return flight to the UK. In 2015 she was advised that her father's brother had been kidnapped by members of the cult in response to news that she was pregnant.

[6] Having narrated this evidence, the FTT expressed (at paragraph 33) the view that the petitioner's stated position was not credible. In succeeding paragraphs the FTT set out its reasons for arriving at that view, including the petitioner's vagueness in describing the visits of cult members to the family home, and the fact that she retained her freedoms and lived openly and largely without incident in her own home in Lagos.

[7] The FTT then referred to an expert report produced on behalf of the petitioner on the cults in question. The report stated that the cults had national presence and influence and significant power, that they were relentless in their approach to tracing individuals that they wanted, and that a father *might* (emphasis in the FTT decision) pledge a daughter to the high priest. The FTT observed, firstly, that the petitioner's description of leaving home and then living openly in Lagos was not consistent with the description in the expert report, and, secondly, that the comment about a father pledging a daughter did not appear to be a common scenario or to be evidence-based. For these reasons, the FTT judge (at paragraph 37) stated his view that "…whilst the expert sets out, by way of background evidence, something which is externally consistent, I do not rely heavily on that".

[8] At paragraphs 38 to 48 the FTT set out its reasons for not finding credible the petitioner's evidence that her house had been set on fire by members of the cult, that these individuals had threatened her and stolen her car, that she had been tricked into returning to Nigeria and then detained in a room, or that her father's brother had been kidnapped because of information that she was pregnant. The FTT noted that the petitioner had failed to make an asylum claim in the UK until after her visa had expired, and made an adverse credibility finding in terms of section 8(4) of the Asylum and Immigration (Treatment of Claimants etc) Act 2004.

[9] The FTT then referred to a medical report prepared on behalf of the petitioner by a general practitioner. It referred to scars on the petitioner's body but offered no comment as to whether they were accidental or deliberate injuries, or as to their age. The FTT concluded that the report did not assist the petitioner's case and attached no weight to it.

[10] At paragraph 51, the FTT referred to two letters received from individuals in Nigeria, containing details supportive of the petitioner's claim. The FTT noted that they were not attested before a notary public and did not rely upon them. The FTT commented that no statement had been produced from a member of the petitioner's family, and regarded it as incredible that she had no ongoing contact with any of her family members.

[11] Finally, the FTT expressed the view that the petitioner did not make an impressive witness and that she was evasive. Her appeal on asylum grounds was dismissed.

The petitioner's application for leave to appeal to the Upper Tribunal

[12] The petitioner's application to the Upper Tribunal for leave to appeal to it contained the following grounds (in summary):

(i) The FTT erred in law by reaching conclusions on the petitioner's credibility before surveying all of the evidence including the expert reports, the GP report and the supporting witness statements, and by making findings for which there was insufficient evidential support;

(ii) The FTT erred in law in failing to attach due weight to the expert report;

(iii) The FTT erred in law by failing with regard to various specified matters to take into account material evidence, by reaching findings which were not supported by evidence, or by failing to explain why its findings had been reached in light of the evidence.

The Upper Tribunal's decision

[13] The Upper Tribunal refused the application for permission to appeal. Its reasons included the following:

> "The grounds are wholly without merit. Each point raised amounts to a disagreement with the findings, an attempt to re-argue the case and/or a misrepresentation of the decision of the judge.
>
> …
>
> Ground 1 is without merit. Whilst the judge chose to disclose the outcome of the appeal at [33], on a proper reading of the decision, the judge considered the evidence in the round including the evidence of the expert and the GP.
>
> …
>
> Ground 2 does not identify an arguable error. The issues raised are disagreements with the findings. It is unarguably the case that an expert report should be properly sourced.
>
> Ground 3 in the main is an attempt to re-argue the case…"

Argument for the petitioner

[14] On behalf of the petitioner it was submitted that the Upper Tribunal had erred in law when refusing permission to appeal, and in particular had erred in each of its findings that the grounds of appeal were not arguable. Firstly, the Upper Tribunal had failed to appreciate that the FTT had made the error identified in *TF and MA* v *Secretary of State for the Home Department* 2018 SLT 1225, namely that it had assessed the credibility of the petitioner's evidence on its own and not, as it ought to have done, in the round, and then allowed its adverse assessment of the petitioner to colour its approach to the expert report, the medical report, and the two statements from individuals in Nigeria. The FTT ought not to have reached a conclusion regarding the petitioner's credibility without first considering all of the evidence, including evidence supportive of or at least consistent with that of the petitioner. It had not been adequately explained why the petitioner was found not to be credible. The terms of her witness statement had not been properly taken into account.

[15] Secondly, the Upper Tribunal had erred in law in finding that the FTT's findings regarding the vagueness of the petitioner's account of visits to her home, her evidence regarding the fire and a subsequent encounter with cult members, and her evidence of being tricked into returning to Nigeria were grounded in the evidence. The petitioner's position was supported, not contradicted, by the expert evidence. Thirdly, the Upper Tribunal erred by failing properly to address the grounds of appeal in so far as founded on the petitioner's evidence of the fire and subsequent approach by cult members. Fourthly, the Upper Tribunal failed to appreciate that the FTT had given no adequate reasons for finding the petitioner's evidence vague and in characterising her as evasive. Fifthly, the Upper Tribunal had failed properly to address the second and third grounds of appeal, which identified "well-known errors of law".

Argument for the respondent

[16] On behalf of the respondent it was submitted that no error of law by either the Upper Tribunal or the FTT had been identified. It was not correct to say that the FTT had committed the error identified in *TF and MA*. Although the FTT had stated conclusions regarding the petitioner's credibility at paragraph 33, it was clear that all of the evidence had been considered in the round. The remainder of the grounds of appeal consisted of no more than disagreement with the FTT's findings. The Upper Tribunal had been correct so to characterise them.

Decision

[17] In my opinion there is no merit in any of the petitioner's arguments. The principal submission on her behalf was that based upon *TF and MA*. In that case two Iranian nationals claimed asylum on the basis of *inter alia* a well-founded fear of persecution arising out of their conversion to Christianity while in the UK. In each case the FTT did not believe that the conversion was genuine, and refused the appeals on that basis. Both appellants had led evidence from church members expressing views that their conversion was genuine. The FTT concluded, however, in each case that the appellant's failure to be truthful about other matters, such as (in TF's case) participation while in Iran in anti-regime activities and (in MA's case) a homosexual encounter, undermined his claimed conversion to Christianity. In consequence, the FTT dismissed the appeals. Leave to appeal having been refused by the Upper Tribunal, the matter came before the court in a petition for judicial review.

[18] Delivering the opinion of the court, Lord Glennie observed (paragraphs 37 and 38) that for a FTT judge to find that an appellant's failure to provide honest information on one

aspect undermined his evidence on another aspect was a rational approach to finding the facts, but that there were limits that the judge had to be careful to observe. In the cases before the court, the FTT judges, having formed adverse views regarding the appellants' credibility, appeared to have paid little attention to the evidence of other witnesses. At paragraphs 47-50, Lord Glennie identified three overlapping points of importance where a judge might fall into error: (i) the judge should not jump too readily to the conclusion that because an appellant has told lies about some matters then his credibility on all matters is fatally undermined; (ii) the judge should not allow an adverse finding about the credibility of an appellant to sway his assessment of the credibility and relevance of other independent evidence bearing upon the issue before him; and (iii) it is wrong in principle for a judge to form a concluded view of the probable veracity of particular items of evidence and then, from that fixed point, to allow that view to govern the assessment of other evidence in the case. The proper approach was to consider all the evidence "in the round" before arriving at any concluded view on the facts.

[19] In the present case, the FTT's observation that the petitioner's stated position did not withstand scrutiny appeared at paragraph 33 of a decision in which the judge's assessment of the asylum claim did not finish until paragraph 53. But when the decision is read as a whole it is quite clear that the judge did not commit any of the errors described in *TF and MA*. The FTT's assessment of the petitioner's credibility did not stop with the statement in paragraph 33. On the contrary, most of the following paragraphs consist of the FTT's detailed reasoning of why each element of the petitioner's evidence was rejected in turn as not credible. Each element is addressed on its own merits and rejected for reasons specific to it; the FTT has not committed the error of finding one element incredible and then applying that finding to another unrelated element. There is no indication that the FTT has regarded

the petitioner's evidence as a whole to have been fatally undermined by any particular point on which she has been found to have been untruthful.

[20] Nor, in contrast to the facts of *TF and MA*, has the FTT allowed its adverse assessment of the petitioner to colour its approach to other evidence. Subject to one point, it is apparent from the decision, especially at paragraph 36, that the FTT did not take any issue with the expert report itself. The problem for the petitioner was that to the extent that it was not in generic terms, it relied upon information provided by her. In critical respects, it did not provide support for her claim to be at risk, having regard in particular to the fact that she had been able to live openly in Lagos for a period of years without harm. The exceptional point was the expert's opinion that a father might pledge his daughter to a high priest. The FTT did not rely heavily on that statement, not because it had formed an adverse view of the petitioner, but rather for the entirely proper reason that the statement was tentative and did not appear to have an evidential basis. The medical report was not given weight not because the FTT had formed an adverse view of the petitioner but because the GP expressly declined to offer a view on the cause or age of the scars observable on the petitioner's body. The two letters of support were not relied upon because they were not attested.

[21] Taking all of the above into account, there is in my opinion no substance to the petitioner's assertion that the FTT failed to consider the evidence "in the round". The FTT carefully considered the petitioner's oral and written evidence, and the independent evidence adduced in support of her appeal. The Upper Tribunal was, in my view, entirely correct to reject this ground of appeal as wholly without merit.

[22] Most of the other grounds upon which the petitioner seeks to challenge the decision of the Upper Tribunal and, through that, the decision of the FTT, can be addressed together.

They amount, in my opinion, to no more than attempts to reopen findings made by the FTT that were based upon evidence before it and properly and adequately explained in its decision. In so far as the FTT characterised the petitioner's evidence as vague, for example in paragraph 34 (visit by cult members to her father's house) and paragraph 38 (the car incident), that characterisation is explained and examples of the vagueness given. The expert report provided no support on the issue of whether incidents which the FTT considered to be inherently implausible actually happened. In each case where the FTT has rejected evidence as implausible, an explanation has been provided for that assessment. In essence, the petitioner's complaint is that the judge erred in not finding her to be credible. The Upper Tribunal was correct to hold that that complaint did not constitute an arguable error of law.

[23] Finally, it was contended that the Upper Tribunal erred in failing to appreciate that the FTT had not adequately supported, by examples, its finding that the petitioner was not an impressive witness and was evasive. Reference was made to observations by the Upper Tribunal in its *ex tempore* judgment in *MK* v *Secretary of State for the Home Department* [2013] UKUT 00641 (IAC), summarised at the beginning as follows:

> "If a tribunal finds oral evidence to be implausible, incredible or unreliable or a document to be worth no weight whatsoever, it is necessary to say so in the determination and for such findings to be supported by reasons. A bare statement that a witness was not believed or that a document was afforded no weight is unlikely to satisfy the requirement to give reasons."

Again there is no substance to the criticism. It is quite clear that the FTT's adverse finding on credibility was based mainly upon what it regarded as the inherent implausibility of the petitioner's evidence, rather than upon her demeanour as a witness. In any event, the observation that she was not an impressive witness was explained by what followed in paragraph 52: she failed to listen to questions, to answer them directly, to not answer

questions she did not understand, and to advise that she did not know the answer if that were the case. An example of evasiveness was provided at paragraph 42 regarding the immigration status of the father of her son.

Disposal

[24] For these reasons I shall sustain the respondent's second plea in law and refuse the petition.